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Federalism and Separation of Power
Ramifications of Repealing the 17th Amendment
An Exchange Between Todd Zywicki and Ilya Somin

WHY REPEALING THE 17TH AMENDMENT WON'T CURB FEDERAL POWER

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Some conservatives and libertarians believe that the 1913 adoption of the Seventeenth Amendment--which requires that senators be elected by popular vote, rather than by state legislatures--was a great mistake that led to a vast expansion of federal power. They argue that repealing the amendment would be a major step toward reigning in federal overreach. [1] In 2010, the call for repeal was taken up by many activists associated with the Tea Party Movement. [2]

Repeal advocates such as Gene Healy of the Cato Institute assert that the Amendment "has done untold damage to federalism and limited government." [3] The assumption underlying such claims is that senators elected by state legislatures would be more interested in protecting state autonomy than senators elected by voters, and therefore more committed to limiting federal power.

Unfortunately, repeal of the Seventeenth Amendment is unlikely to have the effect that advocates hope for. This is so for two reasons. The Amendment actually had little if any effect on the scope of federal power because most senators would have been popularly elected even without it. Moreover, there is no reason to expect senators elected by state legislatures to be more opposed to federal power than popularly-elected senators.

I. NEARLY ALL SENATORS WOULD BE ELECTED BY POPULAR VOTE EVEN WITHOUT THE SEVENTEENTH AMENDMENT.

As Professor Todd Zywicki (a leading academic critic of the Amendment) showed in a 1997 article, by 1908 twentyeight of the then forty-six states already had laws that mandated popular election of senators. [4] Nine other states required the legislature to take account of popular votes, though they stopped short of taking away all legislative discretion. [5] Given the strong political trend toward popular election of senators at the state level, it is likely that all but a handful of states would have enacted popular election within a few years after 1913 even without the federal constitutional amendment. It is debatable whether any states would have held out against popular election to the present day. Even if one or two had done so, the likely effect on policy outcomes would probably have been minimal. The presence of two or four legislatively-selected senators in a chamber with 100 members would have done little to change the general trend of legislation.

If the amendment were repealed today, popular election would almost certainly remain in the vast majority of states. As Todd Zywicki recognizes, "Democracy is popular." [6] In theory, popular election could potentially be blocked if the amendment repealing the Seventeenth included a ban on state legislation designed to ensure that senators are chosen by popular vote. It

would be difficult, but perhaps not impossible, to draft an amendment that could effectively preclude all the different devices state legislatures could use to promote popular election of senators. [7]

But an amendment of that type would face even more daunting political odds than a straightforward repeal of the Seventeenth. In addition to the extraordinary uphill struggle that any amendment effort faces, such a preclusive amendment could be portrayed as infringing on state autonomy, as well as undermining democracy. And even an amendment banning the use of popular vote devices for selecting senators could not prevent state legislators from promising to choose whatever candidate for the Senate had the greatest amount of popular support, as demonstrated, for example, by public opinion polls. In many states, there might be substantial political pressure for state legislators to make such pledges.

II. SENATORS CHOSEN BY STATE LEGISLATORS WOULD NOT WANT TO LIMIT FEDERAL POWER MORE THAN POPULARLY-ELECTED SENATORS DO.

Even if a constitutional amendment could effectively eliminate popular election of senators and replace it with selection by state legislatures, it is far from clear that federal power would contract. The claim that senators chosen by state legislatures would act to curb the feds relies on the assumption that state governments oppose federal power. Professor Todd Zywicki argues that, before the Seventeenth Amendment, "senators had strong incentives to protect federalism [because] [t]hey recognized that their reelection depended on pleasing state legislators who preferred that power be kept close to home." [8]

Whatever was the case before 1913, under modern conditions senators chosen by state legislatures often have strong incentives to support expanded federal power. Those incentives arise precisely *because* senators' reelection depends on "pleasing state legislators." The state legislators in question are often heavily dependent on federal subsidies and regulations. They are unlikely to do anything to overturn the federal trough at which they themselves regularly feed.

State governments routinely lobby for grants of federal money. [9] In recent years, state dependence on federal funding has increased enormously, as a result of the fiscal crisis some states have found themselves in during the present recession. In 2009, federal grants-in-aid accounted for 24.2% of all state government revenue, up greatly from 19.8% in 2007. [10] State governments are anxious to get as much federal grant money as possible. This reality is unlikely to change if the Seventeenth Amendment were repealed and legislative selection of senators reinstated. To the contrary, senators chosen by state legislators would face even stronger incentives to lobby for additional federal grants than popularly-elected senators do. The political survival of the former would be completely at the mercy of the very state governments that benefit from federal grants.

State governments also often support federal regulations and spending programs that reduce competition between state governments and benefit interest groups that have influence at the state level. [11] States compete with each other for businesses and taxpayers. Like any other competitors, they often prefer to establish a cartel that will minimize competition and enable them to collect higher "profits" in the form of increased tax revenue. [12] Here too, senators chosen by state legislators would have strong incentives to lobby for expanded federal power ***92** whenever such is in the interest of the state governments they represent.

If senators were chosen by state governments rather than by voters, the *composition* of federal spending and regulation might indeed change. More federal money would flow to state governments and those interest groups that have influence over them. We could potentially see more federal grants to small, local interest groups, such as those that lobbied for the notorious "bridge to nowhere" in Alaska. [13] There would also be more regulations benefiting state officials and associated private interests. On

the other hand, the federal government might become less solicitous of interest groups that do not have much leverage at the state level.

Repeal of the Seventeenth Amendment *could* potentially lead to reduced federal spending if the Supreme Court began to enforce constitutional limits on federal grants to state governments. [14] If Congress could not hand out money to the states or could only do so for a very narrow range of purposes, then state governments would have more reason to oppose federal spending. Increased federal spending and taxes would then make it more difficult for the states to raise tax revenue for themselves.

But so long as Congress has the power to give the states handouts for virtually any purpose, senators chosen by state legislators are unlikely to oppose federal power any more than current senators do. At this point, there is little prospect that the Court will crack down on federal grants to state governments in the foreseeable future. In *Sabri v. United States*, a 2004 decision, the justices unanimously ruled that even grants with conditions that have very tenuous links to any federal interests are constitutional. [15] In the key 1987 case of *South Dakota v. Dole*, the Supreme Court reiterated the rule that the Spending Clause of the Constitution gives Congress the power to give grants to the states so long as they promote the "general welfare" and emphasized that courts should "defer substantially to the judgment of Congress" in determining whether any particular grant program actually advances the general welfare or not. [16] Although I and some other academic commentators have criticized this deferential policy, [17] there is little chance that it will change in the near term. Both conservative and liberal justices seem to accept the status quo.

CONCLUSION

The Seventeenth Amendment is not necessarily beneficial. I am not convinced that any great harm would result from repealing it. Indeed, a straight-up repeal of the amendment would probably have little effect of any kind, since popular election of senators would persist in most states even if it were no longer constitutionally mandated. Even a more aggressive repeal amendment that outlawed popular election might not make the political system any worse than it is today.

But advocates of federalism and political decentralization have little if anything to gain from pursuing repeal. Even if they somehow succeed, such efforts are unlikely to result in any meaningful new constraints on federal power.

Perhaps an effort to repeal the Seventeenth Amendment could help rein in federal power by galvanizing support for political decentralization more generally. In that event, it might still be worth undertaking. But any such effect seems unlikely. Repeal of the Seventeenth Amendment is not a cause likely to attract much political support outside of a hard core of conservative and libertarian activists. If the Tea Party movement or other conservatives choose to make repeal a major focus of their political efforts, the attempt could even backfire. Associating federalism with an "anti-democratic" amendment could help turn moderate public opinion against federalism more generally.

Those who believe that repeal of the Seventeenth Amendment is the key to a revival of federalism in the United States are barking up the wrong tree. They would do well to invest their limited political resources elsewhere.

Footnotes

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1 *See, e.g.*, Todd Zywicki, *Repeal the Seventeenth Amendment*, NAT'L REV., Nov. 15, 2010, available http://www.nationalreview.com/articles/252825/repeal-seventeenth-amendment-todd-zywicki?page=1; Gene Healy, *Repeal the 17th Amendment?* WASH. EXAMINER, June 8, 2010, *available at* http://www.cato.org/pub_display.php?pub_id =11876.

2 *See, e.g.*, Aaron Blake, *Tea Party Pushes 17th Amendment to the Forefront*, Hill, May 3, 2010, *available at* http://thehill.com/blogs/ballot-box/houseraces/95705-tea-party-pushes-17th-amendment-to-the-forefront?page=1 #comments.

3 Healy, *supra* note 1.

4 Todd Zywicki, *Beyond the Shell and Husk of History: The History of the 17th Amendment and Its Implications for Current Reform Proposals*, 45 CLEVE. ST. L. REV. 165, 192 (1997).

5 *Id.*

6 *Quoted in* Healy, *supra* note 1.

7 *See* Zywicki, supra note 4, at 191-93 (describing several of them).

8 Zywicki, *Repeal Seventeenth Amendment*, supra note 1.

9 *See* John McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 117-18 (2004).

10 Figures calculated from COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT, Tbl. B-83 (2011), *available at* http:// www.gpoaccess.gov/eop/2011/xls/ERP-2011-table83.xls.

11 *See generally* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 333-340 (2003) (showing how states can lobby for federal intervention that reduces interstate competition).

12 *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION 182-83 (1980); *id.* at 333-40; Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 470-71 (2002).

13 This $398 million bridge project would have benefited only a tiny handful of people. It was finally abandoned after it became a national scandal and symbol of wasteful federal spending benefiting local interest groups. *See* Steven Quinn, *Alaska Abandons Controversial Ketchikan Bridge Project*, SEATTLE TIMES, Sept. 22, 2007, *available at* http:// seattletimes.nwsource.com/html/localnews/2003897011_webbridge22.html.

14 For a defense of such judicial intervention, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002); and John Eastman, *The Spending Power*, 4 CHAP. L. REV. 1 (2001).

15 Sabri v. United States, 541 U.S. 600 (2004) (upholding federal grant to state governments conditioned on allowing prosecution of state officials for taking bribes even if the bribery in question had no connection any federal project).

16 South Dakota v. Dole, 483 U.S. 203, 207 (1987).

17 *See* Somin, *Pandora's Box, supra* note 14; Eastman, *supra* note 14; Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001).

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